IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY MUCCI	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE HOME DEPOT	:	**No. 00-4946**

M E M O R A N D U M

WALDMAN, J. **December 18, 2001**

This case involves a false statement made by plaintiff's employer to him upon his termination.[1] Plaintiff has asserted claims for breach of contract, wrongful denial of a bonus and misrepresentation.[2] The case was removed to this court from the Bucks County Common Pleas Court pursuant to 28 U.S.C. §§ 1441(a). The court has diversity jurisdiction. Presently before the court is defendant's motion for summary judgment.

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of

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[1] The correct spelling of plaintiff's name is Muccie. Why plaintiff's attorney misspelled his client's name in the caption of his complaint and, without moving to correct the caption, has continued to misspell it in each subsequent submission is not altogether clear. Plaintiff has also failed correctly to designate the defendant which is actually Home Depot U.S.A., Inc. No party has moved to correct this misdesignation.

[2] In his complaint, plaintiff simply captions this claim as one for "misrepresentation." In his brief, however, he explains that he meant thereby to assert claims for both fraudulent and negligent misrepresentation.

material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Anderson, 477 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

From the competent evidence of record, as uncontroverted or otherwise taken in the light most favorable to plaintiff, the pertinent facts are as follow. Plaintiff was

hired by defendant as a back end administrative receiver in November 1992. Between 1992 and his termination in January 2000, plaintiff was transferred between several of defendant's stores in suburban Philadelphia. He was eventually promoted to the position of store manager. He was employed in this capacity at defendant's store in Willow Grove in January 2000. Plaintiff was at all times an at-will employee.

During the period of plaintiff's employment, defendant maintained a stock option plan which was administered by a committee of the Board of Directors. Under the plan, the committee has discretion in selecting which employees and members of the Board who are not employees are eligible to receive options and under what terms. Options were issued to plaintiff under six virtually identical Stock Option Agreements (the "Agreements") which set forth the price at which and the conditions under which the options could be exercised. The Agreements provide that the options would become exercisable in increments of 25% of the total number granted on the first, second, third and forth anniversaries of the grant date. The options are inalienable, except by will or the laws of descent and expire ten years after the grant date.

The Agreements contain a clause, set in bold type, which provide distinct rights for parties who are terminated for

cause and those who leave employment for other reasons. The Agreements provide in pertinent part:

> Upon the event of termination of your employment . . . [or] ceasing to maintain salaried payroll status while continuing employment, Option shares which have not become exercisable as of the date of such event shall immediately lapse. Option shares which are exercisable as of the date of termination of employment will lapse unless exercised within a period of three months.

(emphasis added). As to employees discharged for cause, the Agreements provide "[i]n the event of Discharge for Cause, all Option shares, whether presently exercisable or not, shall immediately lapse and become null and void on and as of the date of termination." (emphasis added).

In the same paragraph, Discharge for Cause is defined as follows:

> "Discharge for Cause" shall mean the termination from employment because of an event involving moral turpitude or dishonesty, a gross failure or negligence on the part of the associate to perform his or her expected duties, a violation of the Company substance abuse policies, or willful misconduct or action by the associate that is damaging or detrimental to the Company. A determination by the Company that a termination is a Discharge for Cause will be conclusive and binding.

Plaintiff was suspended on January 24, 2000. On January 27, 2000, he attended a meeting with Jim Aller, defendant's human resource manager, Bob Winegardner, defendant's district manager, and (via conference call) Jim Kane, the regional vice president. Plaintiff was informed at this meeting that his employment was being terminated for violation of company

policy and procedures, specifically his intentional disregard of the hiring system required by a consent decree and falsification of records.[3] This oral termination was accompanied by an Associate Performance Notice ("Notice") which set forth in writing the reasons for termination.

After Mr. Kane's participation in the meeting ended, plaintiff asked about the status of his stock options and health benefits. Mr. Winegardner stated that plaintiff had 90 days from the date of his termination in which to exercise any presently exercisable options. Mr. Aller stated that there would be no interruption in medical benefits coverage. These statements were factually incorrect. Defendant immediately cancelled plaintiff's medical benefits and stock options.

The Notice was signed by Mr. Winegardner and had an acknowledgment line on which plaintiff affixed his signature. He would not have done so had he known that the statements about benefits and stock options were incorrect.

Plaintiff was advised in February 2000 by Smith Barney that there were no exercisable options in his name pursuant to the pertinent stock option agreements. He then contacted Mr.

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[3] The consent decree provides that if "store management purposefully hires an applicant or moves an associate without using this established system, the Store Manager will be immediately terminated."

Aller. After contacting corporate headquarters in Atlanta, Mr. Aller informed plaintiff that there were no exercisable options.

Plaintiff claims that the statements regarding medical coverage and stock options gave rise to a contract which defendant breached. Plaintiff also claims that defendant refused to pay him an annual bonus to which he was entitled. He claims that the statements concerning medical coverage and stock options were actionable misrepresentations.

Plaintiff has conceded that he incurred no uncovered medical expenses and "was terminated from employment before the bonus was due." He acknowledges that he has no viable claim for the bonus or for breach of contract and misrepresentation predicated on the statement of Mr. Aller regarding medical benefits. This leaves plaintiff's claims for breach of contract and misrepresentation based on the statement that plaintiff's stock options could be exercised in the 90-day period following his termination. Plaintiff contends this statement resulted in an enforceable oral contract or oral modification of the terms of the stock option plan and Agreements.

Proof of an enforceable contract requires a showing that both parties manifested an intent to be bound by the terms of the agreement; terms which are sufficiently definite to be specifically enforced; and, a mutuality of consideration. Channel Home Centers v. Grossman, 795 F.2d 291, 298-99 (3d Cir.

1986). Consideration is "an act, forbearance, or return promise bargained for and given in exchange for the original promise." Universal Computer Systems v. Medical Services Ass'n, 474 F. Supp. 472, 477 (M.D. Pa. 1979), aff'd, 628 F. 2d 820 (3d Cir. 1980); Cardamone v. University of Pittsburgh, 384 A.2d 1228, 1232 n.6 (Pa. Super. 1978).[4]

The Agreements governing the stock options plainly provide that the options are immediately terminated upon discharge for cause. A determination of "cause" is expressly committed to defendant's unfettered discretion and is "conclusive and binding." Thus, the pertinent statement about the stock options was made at a time when plaintiff had no entitlement to

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[4] Defendant asserts without challenge that the existence and terms of an oral contract must be established by "clear and precise evidence." The court is satisfied, however, that an oral contract may be established by a preponderance of the evidence. See Robert Billet Promotions, Inc. v. IMI Cornelius, Inc., 1998 WL 721081, *13 (E.D. Pa. Oct. 14, 1998) (holding oral contract must be proved by preponderance of evidence and rejecting contention clear and convincing evidence is required); Steelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc., 862 F. Supp. 1361, 1365 n.6 (E.D. Pa. 1994), aff'd in part and vacated in part on other grounds, 63 F.3d 1267 (3d Cir. 1995), cert. denied, 516 U.S. 1172 (1996); Pinizzotto v. Parsons Brinkerhoff Quade & Douglas, 697 F. Supp. 886, 888 (E.D. Pa. 1988) (rejecting higher standard of proof and upholding finding of oral contract from preponderance of evidence). The same is true of an oral modification of a written agreement in the absence of an express provision specifically prohibiting non-written modifications. See First Nat. Bank of Pa. v. Lincoln Nat. Life Ins. Co., 824 F.2d 279, 280 (3d Cir. 1987); Nicolella v. Palmer, 248 A.2d 20, 23 (Pa. 1968); Sperra v. Urling, 188 A. 185, 186 (Pa. 1936); Bentz v. Barclay, 144 A. 280, 282 (Pa. 1928); Koeune v. State Bank of Schuylkill Haven, 4 A.2d 234, 237 (Pa. Super. 1939).

the options. As noted, an enforceable contract requires consideration on both sides. See Estate of Beck, 414 A.2d 65, 68 (Pa. 1980) ("[c]onsideration is a bargained for exchange, evidenced by a benefit to the promisee and a detriment to the promisor") (quoting Williston on Contracts). See also Farnsworth on Contracts § 2.5 (2d ed. 2000) (gratuitous promise is not enforceable for lack of consideration).

Plaintiff contends that his signing the Notice constituted consideration. As plaintiff concedes in his deposition, however, defendant could and would have terminated him whether he signed an acknowledgment of the written Notice or not. Plaintiff contends that by signing the Notice, he waived the right to contest his termination. The Notice, however, imports no admission or waiver by plaintiff of any kind. The Notice is simply a document formally setting forth defendant's reasons for terminating plaintiff. The document nowhere provides that plaintiff's signature serves as anything other than an acknowledgment of its receipt and does not purport to foreclose any legal action based on the termination.[5] The Notice is legally insignificant. By signing the Notice, plaintiff did not

[5] Plaintiff also suggests that defendant ignored an unspecified internal policy by not giving him counseling and an opportunity to avoid further improper behavior before termination. There is, however, no competent evidence of record of such a policy, let alone one applied to infractions such as plaintiff's for which termination was provided in a consent decree. In any event, the Notice does not purport to preclude plaintiff from asserting any claim based on any contention.

confer anything of value upon defendant and gave up nothing himself. The incorrect representation about the stock options was a gratuitous one.[6]

An essential element of negligent and fraudulent misrepresentation is an injury proximately caused by a plaintiff's justifiable reliance on the misrepresentation in question. See Gibbs v. Ernst, 647 A.2d 882, 889-90 (Pa. 1994). Even assuming plaintiff was justified in relying on an impromptu oral statement about the stock options which contradicted the plain written terms of the applicable Agreements, plaintiff has presented no competent evidence of injury resulting from any reliance upon the statement. As noted, plaintiff was no worse off by signing the Notice and would have been in no better position had he declined to sign.

Plaintiff has failed to present competent evidence sufficient to sustain any of his claims. Accordingly, defendant's motion will be granted. An appropriate order will be entered.

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[6] Insofar as plaintiff suggests that the representation amounted to an oral modification of the Agreements, an oral modification of a written agreement is also unenforceable in the absence of consideration. See Pellegrene v. Luther, 169 A.2d 298, 299 (Pa. 1961).

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O R D E R

AND NOW, this day of December, 2001, upon consideration of the defendant's Motion for Summary Judgment (Doc. #8) and plaintiff's reply thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT** is **ENTERED** in the above action for the defendant.

BY THE COURT:

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JAY C. WALDMAN, J.